United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7212
77-7223

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7212
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UNITED STATES COURT OF APPEALS
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DANIEL FUSARO, CLERK
SECOND CIRCUIT

LEONARD DESSER, MELVIN DESSER and JACOB LANDESMAN,
Plaintiffs-Appellees-Appellants,

— against —

ROY A. ASHTON,
Defendant-Appellant-Appellee,

— and —

JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.
Defendants-Appellees.

B P/S

BRIEF FOR PLAINTIFFS-APPELLEES-APPELLANTS

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PRELIMINARY STATEMENT

The appeal and cross-appeal herein are taken from the judgment of the United States District Court for the Southern District of New York, dated March 31, 1977, by the Honorable Lawrence W. Pierce.

The opinion of the Court dated November 7, 1975 is reported at 408 F. Supp. 1174. The decisions of the Court dated June 29, 1976 and March 3, 1977 are unreported.

QUESTIONS PRESENTED

1. Did the Court err when during plaintiffs' direct case it dismissed plaintiffs' claim under § 10(b) of the Securities and Exchange Act of 1934 where there was evidence that defendant Ashton fraudulently entered into an agreement with plaintiffs for the purchase of securities without intent to perform that agreement and solely to obtain certain confidential information from plaintiffs?

2. Did the Court err in dismissing plaintiffs' fourth cause of action after trial where the evidence proved that Youngblood had knowledge of Ashton's agreement with plaintiffs and intentionally induced a breach thereof for his own pecuniary benefit?

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This action was commenced in 1969 by plaintiffs Leonard Desser, Melvin Desser (referred to together as the "Dessers" and individually by their full names) and Jacob S. Landesman ("Landesman") (collectively referred to as "plaintiffs") pursuant to 28 U.S.C. § 1331, alleging violation of § 10(b) of the Securities and Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78(j), and Rule 10b-5 of the Rules of the Securities Exchange Commission in connection with an oral agreement of June 20, 1966 (A. 6).* Pendant claims for breach of written contract and tortious inducement to breach that contract (A. 52) were thereafter asserted.

At the close of the trial of this action, plaintiffs moved to conform the pleadings to the proof (T. 852)** to assert a claim in quantum meruit and unjust enrichment. That motion was granted (A. 155).

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* Page references preceded by "A" are to the Joint Appendix.

** References preceded by "T" are to the transcript of the proceedings below.

Defendants' answer alleged that the agreements in question were induced by fraud, that the complaint failed to state a claim, that the Court lacked personal jurisdiction over defendants James Youngblood ("Youngblood") and Trans-Industries, Inc. ("Trans-Industries"), that the agreement upon which the § 10(b) claim was premised was void as not contained in a writing, and that the agreement upon which the breach of contract claim was based was void as in restraint of trade (A. 61).

At the opening of the trial of this action defendants moved for summary judgment on the ground that an oral agreement for the purchase of securities was insufficient to satisfy the requirement of a contract for purchase or sale as required by § 10(b) and Rule 10b-5 (A. 94; see, A. 72). The Court denied the motion (A. 90 et seq.; T. 61).*

The non-jury trial was bifurcated. Issues with respect to liability were tried over the course of six days. On June 29, 1976 the Court rendered its decision, holding that defendant Roy A. Ashton ("Ashton") had breached a valid con-

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* By prior decision, the Court had upheld the sufficiency of the complaint (A. 51).

tract with plaintiffs (the "third cause of action") (A. 145) and dismissing the fourth cause of action, grounded in inducement of that breach by the other defendants (A. 148-9, A. 151).*

After further trial with respect to damages and on March 3, 1977, the Court awarded plaintiffs damages against Ashton in the sum of $100,000, representing the reasonable value of plaintiffs' finders services, together with interest from September 28, 1967 (A. 170-171).

On April 6, 1977 judgment was entered for plaintiffs and against Ashton in the aggregate sum of $166,875 (A. 172-174) and dismissing the complaint as against Youngblood and Trans-Industries (A. 173).

Ashton thereafter filed his Notice of Appeal from the aforesaid judgment and plaintiffs cross-appealed.

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* Plaintiffs' securities' fraud claim was dismissed by the Court during plaintiffs' presentation of their case (T. 507-8). The Court retained the remaining causes of action in its discretion (A. 137-138).

B. STATEMENT OF FACTS

1. The Plaintiffs Commence Efforts To Find A Buyer For Transign

On August 9, 1965, the Dessers placed a classified advertisement in the Wall Street Journal in which they offered to assist persons in the purchase or sale of businesses (A. 116; Def. Ex. F). In response on August 10, 1965 Youngblood wrote a letter to the Dessers (A. 103; Ptf. Ex. 3) advising them that he owned a company, Transign, Inc. ("Transign"), which he was willing to sell and describing in brief the company's finances (A. 103-4). Youngblood stated in the letter:

> "This corporation has never been offered for sale before this letter . . . We would ask approximately $2,000,000.00 for this property with no real estate involved in the transaction."

Youngblood offered to discuss "this proposal in person and in detail with your qualified representative, at your convenience" (emphasis in original). Youngblood did not request that the information in the letter be held confidential (A, 103; Ptf. Ex. 3).

Upon receipt of Youngblood's letter, Melvin Desser telephoned him and they agreed to meet in Chicago at the end of August, 1965 (T. 373). That meeting was cancelled shortly before it was slated to occur (T. 373).

In January or February, 1966 Youngblood called Melvin Desser to discuss the sale of Transign (T. 374), stating that he sought an "all cash" sale (T. 374a). He gave Melvin Desser additional information about Transign including the nature of its product, its prospective growth and past earnings history (T. 378).

At or about that time, Melvin Desser flew to Detroit, met Youngblood (T. 378), and visited the Transign Detroit facility (T. 378, 718). Youngblood advised Desser as to Transign's earnings, patents, product line and current operations (T. 378, 718). Youngblood advised Melvin Desser that he was not offering Transign for sale to anyone else (T. 379, 718).

At the meeting, Youngblood rejected the possibility that Transign be purchased by the Catholic Archdiocese which the Dessers represented, because the Church was interested in a long-term payout while Youngblood wanted cash (A. 121).

Desser then proposed to Youngblood that Transign be offered to Natco Industries (subsequently Fuqua Industries) a company with which Desser had had prior business dealings, a proposal Youngblood found satisfactory (T. 376). Melvin Desser presented the offer to Natco's chief executive officer but the deal was rejected early in April, 1966 (T. 377).

Youngblood then, unbeknownst to plaintiffs, made at least two attempts to sell Transign on his own (A. 125; T. 721),

both of which were unsuccessful. There is no evidence that Youngblood imposed any requirement of secrecy or confidentiality in connection with either of these offers.

2. The Dessers Make A Conditional Offer To Youngblood To Buy Transign For Their Own Account And Are Told To Proceed.

On May 16, 1966 the Dessers flew to Detroit and again met with Youngblood (T. 207, 387). At this meeting the Dessers explained that they wished to acquire Transign as principals, by using outside financing, and wanted Youngblood's permission to do so (T. 214, 387). Youngblood stated that he would sell Transign to the Dessers if they could arrange a $2 million cash deal (A. 121; T. 215, 287, 719).

Youngblood represented at that meeting as well that he was not offering Transign to anyone else, although it was later learned that during this period he made two other offers (T. 216-217). Between May 16 and June 10, 1966 the Dessers had discussions, ultimately unsuccessful, with two other entities regarding a possible financing of the acquisition (A. 122; T. 217).

In the last week of May, 1966 Leonard Desser described the Transign situation to Landesman, an attorney, in an attempt to raise funds (T. 220-221). Although Leonard Desser gave Landesman general financial information about the company he

deliberately did not disclose its name or the nature of the product line (A. 122; T. 69). Landesman spoke to Thomas Davidson ("Davidson") and Theodore Donson ("Donson"), who, like Landesman, were associate attorneys at Cravath Swaine & Moore ("Cravath"), about the company, and Davidson indicated that British-American Insurance Co. ("British-American") might be interested in the acquisition (A. 122; T. 68).

3. Ashton Is Brought In To Help Finance The Deal -- Ashton, However, Has Other Plans.

On June 10, 1966 a meeting was held among Leonard Desser, Landesman, Davidson and Donson (T. 225). At the meeting, Leonard Desser indicated that the Dessers were seeking financing to acquire the company as principals (T. 225). Although Leonard gave Davidson and Donson information about the company's earnings he did not divulge its name, location or product line (T. 225-226). Davidson said that British-American might be interested and the parties agreed to arrange a meeting with Ashton, a Vice-Presicent of British-American in charge of acquisitions (A. 122; T. 228).

That meeting was held on June 20, 1966 at the Dessers' New York office (A. 123; T. 230). Present were: the Dessers, Landesman, Davidson, Donson and Ashton (T. 230; A. 123). Ashton told the Dessers something of his background including the fact that he was authorized to make acquisitions for

British-American (T. 232). The Dessers told Ashton that they wished to be principals in connection with any plan to acquire the company and that they were authorized to discuss a financing of the purchase (T. 223-224).

4. Ashton Signs An Agreement With The Dessers.

At the opening of the meeting, the Dessers described the financial history of the company, but would not disclose its name or product-line until Ashton would agree to sign a letter which had been prepared by Landesman (T. 530). The Cravath attorneys reviewed the letter and Ashton signed it (T. 234, 539; A. 102; Ptf. Ex. 1). The text of the June 20 Agreement recited that Ashton signed the letter and agreed to its terms "in order to induce you [i.e., plaintiffs] to make known to the undersigned certain confidential information in regard to the Company."

In the Agreement, Ashton agreed as follows:

> "1. The undersigned will not attempt to acquire the Company or deal with the Company in any manner either personally or in any of his corporate capacities, except on terms and conditions acceptable to you [plaintiffs] in your sole discretion; and
>
> 2. The undersigned will not reveal any information about the Company received by or through you to anyone, except with your [plaintiffs'] express permission." (A. 102)

At trial there was a disagreement as to the representations made by the Dessers prior to the signing of the Agreement, defendants contending that the Dessers induced Ashton to sign the Agreement by means of fraudulent statements with respect to their authority to deal on behalf of Transign. The Court below held that no knowing misrepresentations were made (A. 124-127).*

5. Ashton Agrees With The Dessers To Acquire Transign -- Does He Intend To Be Bound Thereby?

After Ashton executed the June 20 Agreement, the Dessers divulged the name of the company and distributed financial and other information about it (T. 235-237; A. 127).

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* The Court found that the Dessers communicated that "Youngblood was not dealing with anyone else with respect to Transign and that he had not offered the company for sale to anyone else" (A. 125). The Court held that at the time the Dessers made the statements they had no knowledge to the contrary, as Youngblood had not revealed to the Dessers his other attempts to sell (A. 125).

Further the Court found that the Dessers accurately stated it as their intention to be considered as principals in relation to any acquisition of Transign; the Court held that the Dessers did not state that they were the owners or principals of the company (A. 126-127). This view was supported by Davidson's testimony (T. 848). At the June 20th meeting Davidson was apparently representing Ashton and/or British-American (A. 102; Ptf. Ex. 1).

A three to four hour discussion ensued concerning the terms upon which the acquisition of Transign by the Dessers and British-American would be carried out (T. 230-231). At the conclusion, there was an agreement between Ashton* on behalf of British-American and the Dessers that the acquisition would proceed as follows:** (T. 163-167, 196, 244-5, 254, 338-339, 587) a new company would be formed to acquire the assets of Transign. The new company would be owned 65% by British-American and 35% by the Dessers. Of the $2 million cash required to purchase Transign, $1.6 million would be supplied as a loan from British-American to the new company, and $400,000 would be contributed by British-American and the Dessers on a 65-35 basis in return for the issuance of shares of the new company (T. 243, 536). Leonard Desser was to be chief executive officer of the new company at a salary of $35,000 for a three-year period. The Dessers were to have minority representation on the Board of Directors (T. 90, 244).***

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* Ashton stated that he was authorized to act for British-American (e.g., T. 457).

** The Court below held that no agreement was reached (A. 127) except that a further meeting would be held in Detroit in order for Ashton to meet Youngblood (A. 127). Plaintiffs submit that this finding was erroneous. (Point I, infra.)

*** Among the other items agreed upon were: the place of incorporation of the new entity (T. 175, 248), the expense funds which would be available to Desser (T. 244), interest rates on the loan to the new corporation (T. 336-7), security for the loan (T. 337), the type and class of stock to be issued (T. 338), and repayment of the loan in the event of an underwriting (T. 339).

Additional confirmation of the agreement is found in the fact that when Ashton and Leonard Desser met a week later, Ashton had prepared a projected balance sheet and capitalization analysis for the new company based upon the 65-35 agreement (T. 544-545). Further, on or before July 22, 1966, British-American retained Cravath (Ptf. Ex. 14), and Ashton directed Davidson to prepare a letter of intent for Youngblood to sign at the meeting which was to be held on July 26, 1966 (to be discussed below) (T. 401-402). In this letter British-American and Leonard Desser are referred to as the buyers of Transign. These steps would not have been taken if a deal between Ashton and the Dessers had not been made.

6. The Dessers And Ashton Travel To Detroit To Meet Youngblood -- Ashton Readies His Plan To Steal The Company For Himself.

At the conclusion of the June 20, 1966 meeting the Dessers and Ashton agreed to arrange a trip to Detroit to introduce Ashton to Youngblood and acquire further information about Transign. As Youngblood himself testified, but for the intervention of the Dessers, he and Ashton would never have met (T. 715).

Just prior to their departure, the Dessers received from Cravath the original (Ptf. Ex. 4; A. 105) and a carbon (Ptf. Exh. 5) of the proposed letter of intent to be signed by Youngblood in Detroit. At this time, the letters contained no

handwritten notations (T. 402-403).

Between June 20 and July 26, 1966 Melvin Desser spoke with Youngblood several times (T. 397). In one or more of the conversations Melvin Desser told Youngblood about British-American and Ashton, and specifically that British-American was a partner which was going to participate in the financing and acquisition with the Dessers (T. 398-399).

Ashton and the Dessers met Youngblood in Detroit on July 26, 1966 (T. 269). Ashton was introduced as a Vice-President of British-American, a partner in the acquisition (T. 269). Ashton also told Youngblood about his employment and the purpose of his visit (T. 269).*

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* Ashton and Youngblood both claimed that Ashton was introduced as the Dessers' "figure man" and that Youngblood did not know until the evening of July 27, 1966 that Ashton represented British-American (T. 547, 784). Incredibly Ashton testified that despite spending more than eleven hours with Youngblood over a two-day period Youngblood never once asked him any questions regarding his employment or the nature of his work (T. 550). Youngblood, who testified that he acted with the greatest caution and circumspection in attempting to sell Transign, claimed that he simply permitted himself to be grilled hour after hour by Ashton concerning the most intimate details of his business without knowing a single fact about Ashton (T. 784).

The letter of intent, prepared by Ashton (A. 105; Ptf. Ex. 4), itself clearly stated that the acquisition of Transign was to be made by British-American and Leonard Desser and provided for signature by Roy Ashton as British-American's Vice President.*

7. Ashton Brings Another Officer Of British-American To Meet Youngblood -- Ashton And His "Beard" Create A Dispute With The Dessers To Weaken The Dessers' Position.

The parties were joined by Thomas Courtney ("Courtney") on the evening of July 26, 1966. Shortly thereafter, and in Youngblood's presence, a quarrel arose between the Dessers, Courtney and Ashton regarding Leonard Desser's role in the new company and the relative stock participation of the Dessers and British-American, despite Ashton's prior agreement to these terms on June 20, 1966 (T. 272-273).

Courtney indicated that regardless of Ashton's prior statements as to his authority to act for British-American,

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* The Dessers could not have introduced Ashton as a "figure man" when both he and the Dessers intended to have Youngblood sign the letter of intent prior to their departure from Detroit. Youngblood, after seeing the letter could not have believed that Ashton was a "figure man".

there would be no deal and no financing based on the 65-35 arrangement and Leonard Desser's employment (T. 273). Melvin Desser made it clear that if the Dessers did not participate in the new company there would be no deal (T. 274). The meeting broke up after the parties agreed to meet the next day.

On the morning of July 27, 1966, Ashton, Courtney, the Dessers and Youngblood drove to Transign's plant where Youngblood gave them a tour of the factory (T. 276). The group next returned to Youngblood's office where Courtney, Ashton and Leonard Desser continued their argument regarding his employment by the new company (T. 276-277).

While these discussions occurred, Melvin Desser remained with Youngblood. He showed Youngblood the letter of intent (Ptf. Ex. 5) and began making corrections to remove British-American as a prospective purchaser (T. 415, 482), leaving only Leonard Desser as a signatory. Youngblood told Melvin Desser that he was prepared to sign the agreement as corrected immediately and that he wanted to deal only with the Dessers (T. 278, 414). Since the agreement contained numerous handwritten changes, Melvin Desser said he would prepare and mail a clean copy to Youngblood upon his return to New York (T. 416). The Dessers mailed a new agreement to Youngblood two days later (Ptf. Ex. 5A), but he never signed it (T. 417).

Meanwhile, in order to assuage Youngblood's anxiety that information about Transign previously given to Ashton would remain confidential and not be disclosed by Britsh-American, Ashton or Courtney, Melvin Desser advised Youngblood that he had required Ashton to sign a letter agreement "for the purpose of protecting the information we had and protecting our positions in the possibility of purchasing this company and that Mr. Ashton or anyone he was associated with in no way could try to deal for this company" (T. 422).

8. The Big Charade -- Ashton And Youngblood Deal The Dessers Out Of Transign.

Courtney, Ashton and Leonard Desser ended their discussion and the former two left Transign mid-morning. The Dessers remained behind, lunched with Youngblood and left later that day. At lunch, Youngblood repeated his willingness to sign the agreement with the Dessers (T. 227-278). Some eight hours after Ashton left Transign, he called Youngblood from the airport at the latter's home, ostensibly for the purpose of thanking him for his courtesy (A. 130; T. 725).* Youngblood invited Ashton to his home to discuss a proposed deal between British-

* We must surmise that Ashton waited eight hours and called Youngblood at home to minimize the possibility that the Dessers would be present, and with Youngblood, to overhear the conversation.

American and Transign without the Dessers (T. 728).*

At this meeting which lasted some two to three hours, and despite his knowledge of the agreement between the Dessers and Ashton (T. 567, 732), Youngblood invited Ashton to pursue the acquisition without the Dessers. Ashton expressed interest and a $2 million cash purchase was discussed (T. 734). Ashton testified at deposition that on July 27 he advised Youngblood of the June 20 Agreement and his obligations thereunder (T. 559); he conveniently changed his testimony at trial (T. 561). Ashton left the following day.

While Ashton began to pursue the acquisition, the Dessers mailed Youngblood a new letter of intent on July 29, 1975 (Ptf. Ex. 5A), which Youngblood did not sign (T. 423). In early August, Melvin Desser called Youngblood and Youngblood told him of his conversation with Ashton (T. 423).** Melvin Desser re-

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* Not surprisingly, Youngblood and Ashton contended at trial that it was only at this time that Youngblood learned that Ashton represented British-American. The basis for Youngblood's invitation, according to defendants, was to clarify the misunderstanding engendered by the Dessers (T. 557, 727-728).

** Ashton had apparently indicated to Youngblood that the Dessers represented that they were owners and principals of Transign; the Court below found this contention to be without merit (A. 125).

minded Youngblood of the Agreement between the Dessers and Ashton, once again offered to obtain the financing for a $2 million cash deal (T. 426), and told Youngblood that Ashton's version of the facts was incorrect (T. 424).

Melvin Desser spoke with Youngblood again two days later and reminded him that British-American and Ashton could not deal with Transign without Desser participation "because of the June 20th agreement" (T. 426). Within the next two weeks Youngblood and Melvin Desser had a final telephone conversation in which Youngblood advised him that he was going to sell Transign to British-American for $2,900,000 (T. 428).

While Melvin Desser was having no luck with Youngblood, Leonard Desser was equally unsuccessful with Ashton (T. 279, 429). At the beginning of August the Dessers tried to reach Ashton or Davidson by telephone, but their calls were never returned (T. 429). Finally, in August, Leonard Desser called Ashton in the Bahammas and asked whether there was any possibility of arranging a financing (T. 572). Ashton said that British-American would only agree to pay the Dessers a finder's fee. Leonard Desser refused (T. 580). Ashton did not tell Leonard Desser that he was engaged in direct negotiations with Youngblood to purchase Transign nor of his visit to Youngblood's home (T. 571).

9. An Agreement Is Reached To Pay The Dessers $100,000.

Later in August, Leonard Desser and Ashton spoke again and the Dessers agreed to accept a finder's fee in lieu of participating as principals in the new company to be formed by British-American to acquire Transign. The fee was conditioned upon completion of the acquisition (T. 574; A. 109-112).

In early August negotiation for the acquisition of Transign continued even as Ashton and Youngblood kept the Dessers in the dark. Although Ashton and Youngblood testified that there were no negotiations until after the Dessers agreed to accept a finder's fee, their testimony is belied by the evidence (T. 642, 645). First, in a letter dated August 15, 1966 from Ashton to Mr. Lee, Chairman of the Board of British-American (Ptf. Ex. 11), Ashton states that "we have agreed, subject of course to Board approval on:

> 1. Buying the company for $2 million plus a payout to Youngblood for 10 years at $36,000 a year.
>
> 2) Agreed finder's fees with the Dessers of $100,000."

Ashton testified on direct examination that the "we" referred to Ashton and Youngblood (T. 701).

The terms of the acquisition had already been modified beyond a straight cash deal to provide for a long term payout of

an additional $360,000 to Youngblood.

The letter from Cravath (signed by Davidson) to Youngblood on August 22, 1966 (Ptf. Ex. 13) is further evidence that Ashton and Youngblood were in constant communication. In it Davidson requests that Youngblood furnish him with information and documents concerning Transign and, indeed, refers to a list which Ashton previously "has supplied you with". Moreover, Mr. Lee of British-American made his first visit to Transign near the end of August, 1966 (T. 694). Clearly, the acquisition was going ahead full steam without the Dessers -- the finder's fee agreement was not executed until August 31, 1966 (A. 109; Ptf. Ex. 6).*

Youngblood testified that he learned eventually that the Dessers were to be paid $100,000 as a finder's fee (T. 739). Although he conceded questioning Ashton about why the Dessers were receiving a fee, he testified that he could not remember Ashton's response because "I think I was listening to myself" (T. 739).**

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* Ashton himself testified that he made several telephone calls to Youngblood during the month of August although he claims the acquisition was not discussed (T. 592).

** It is hardly credible that Ashton would not have explained the reason for the fee to someone who was to become so intimately connected with British-American. How else could Youngblood have been made to understand the necessity for British-American's continuing involvement with the Dessers? Moreover, in Ashton's August 15th letter to Mr. Lee outlining the terms of the deal (Ptf. Ex. 11), the "we have agreed" (i.e., Youngblood and Ashton) (T. 702) clearly includes the finder's fee for the Dessers despite Ashton's evasive interpretation of the text (T. 703). Thus, it would appear that Youngblood must have known of the fee and of the existence of the June 20 Agreement as the reason for its payment.

After the August 31, 1966 Agreement (Ptf. Ex. 6; A. 109) was signed, the acquisition was submitted to the Board of Directors of British-American in early September (T. 603). The Board approved the transaction and authorized Mr. Lee to go forward (T. 602). On September 30, 1966, however, Youngblood wrote British-American terminating "any and all options to purchase or to represent Transign, Inc." (Ptf. Exh. 7). That letter also terminated the Dessers' rights to a finder's fee under the August 31, 1966 Agreement.

Youngblood sent a copy of this letter to the Dessers despite his testimony that he ceased his dealings with them in the early part of August, 1966 (T. 795). This is additional evidence that he knew of the Desser's economic interest in the outcome.

Youngblood testified that the reason the deal fell through was the inability of any of British-American's insurance company subsidiaries to guarantee certain notes which were to be given to him by the new company (T. 796). There were, however, certain other events which occurred at or about this time which involved Ashton and Youngblood and which cast a different light on the matter.

10. Ashton "Double Deals" British-American Out Of The Deal And Becomes Involved As A Principal.

Prior to his association with British-American, Ashton had been employed by Laird & Co. where he became acquainted with

Dale Coenen ("Coenen") and Duncan Miller ("Miller") (A. 133). After he joined British-American, Ashton talked to them regularly about possible deals and during several of these conversations in the summer of 1966 mentioned the Transign acquisition to them (T. 664, 676-678). In doing so, Ashton, of course, breached one of the terms of the June 20 Agreement.

On September 21, 1966 Coenen met with James Bailey about the possibility of Bailey's becoming the President of Keene Corporation ("Keene") (T. 757). It was Coenen's intention to use Keene as a vehicle to acquire other companies, including Transign (T. 667-668, 773).

Early in October, 1966 (if not sooner) the following events occurred concurrently:

1. Ashton advised Coenen that Transign was available because the British-American acquisition had aborted (T. 610).

2. Ashton was terminated by British-American because of the debacle involving the aborted acquisition (T. 604).

3. Youngblood promptly retained Ashton as a financial consultant for himself and Transign at a retainer of $20,000 (T. 611). Ashton's function was to find someone to purchase Transign (T. 675).

4. Ashton and Coenen attempted to arrange the acquisition of Transign by Keene (T. 613-615).

Ashton must have persuaded Youngblood of the advantage of retaining some equity in Transign as compared with an outright

sale of all his stock or assets, because of the strong possibility of a public offering (T. 622). The close juxtaposition of these events with the abrupt termination of the British-American transaction by Youngblood on September 30, 1966 gives rise to doubt concerning the real cause for Ashton's termination by British-American and the failure of Youngblood to go ahead with the British-American acquisition.

In October or early November, 1966, Ashton borrowed, without collateral, $140,000 from Youngblood to purchase 70,000 shares of Keene as an insider (T. 613-615), as a step toward the contemplated acquisition of Transign by Keene (T. 616). Ashton also advised Youngblood to consider the offer by Keene because ultimately Youngblood would realize substantial monies upon the public offering of Keene which he, Coenen and others expected to occur at an early date (T. 622). The deal aborted in January 1967 (T. 624).

Neither Youngblood nor Ashton advised the Dessers about the possible acquisition of Transign by Keene nor offered them an opportunity to participate therein (T. 615). Ashton did not ask to be released from the terms of the June 20 Agreement (T. 573).*

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* Youngblood imposed no requirement of confidentiality upon anyone in connection with the Keene acquisition.

Between January and July, 1967, Transign was offered to at least the following corporations by Ashton and Youngblood: Sangama Industries, Harvey Radio, and Nationwide Industries (T. 671-672). Again, the Dessers were neither advised of these offers nor given an opportunity to participate,* in direct breach of the June 20 Agreement.

11. Ashton Becomes A Promoter And Arranges Through An Underwriting To Buy Transign From Youngblood -- Youngblood Receives Substantially More Than He Originally Sought, The Dessers Receive Nothing.

In July, 1967 Ashton approached Coenen and Miller and proposed that they purchase Transign as principals (T. 626, 627). Ashton also discussed the possibility with Youngblood (T. 625). A deal was structured whereby Ashton, who was without any financial substance of his own, became the principal in a new corporation, Trans-Industries (T. 627). In September, 1967 Trans-Industries was capitalized with $975,000 from Ashton, Coenen and Miller which funds were arranged for by Coenen and Miller (T. 630-631).

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* In fact, when Melvin Desser called Youngblood in April, 1967, Youngblood told him that he was not interested in selling Transign to anyone (T. 435). Youngblood so advised him in a second telephone conversation prior to July, 1967 (T. 435).

Ashton received 36% of the issued shares of common stock of Trans-Industries (ultimately 450,000 shares) and became President and a director (T. 632). Youngblood also purchased 200,000 shares of Trans-Industries for $25,000 (Ptf. Ex. 8 - pages 23-24; A. 113-115).

In September, 1967 Trans-Industries purchased all of the stock of Transign from Youngblood for $850,000 cash and $900,000 in notes which were paid in January, 1968. Youngblood also sold his patent to Trans-Industries for $1,400,000 in notes (T. 757).

The Dessers were never told by Ashton or Youngblood of the acquisition (T. 633), were never offered an opportunity to participate in the formation of Trans-Industries or the purchase of Transign. Ashton never asked to be relieved of his obligations under the June 20 Agreement (T. 573-574).*

As shown earlier Youngblood knew of the June 20 Agreement between the Dessers and Ashton. Youngblood induced Ashton to breach the June 20 Agreement with the plaintiffs so that his participation in the equity of the new company would be propor-

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* Indeed, when the Dessers met Ashton in New York in October, 1968, Ashton did not even mention the proposed public offering of Trans-Industries which was in registration at that time with the Securities and Exchange Commission (T. 637).

tionately greater without the Dessers, thereby increasing the value of his holdings of Trans-Industries when a public offering was consummated. This was his goal from the time of the breakdown of the acquisition by British-American.*

The intentions of Ashton and Youngblood reached fruition on January 24, 1969. On that day 500,000 shares of Trans-Industries common stock were sold to the public at $5.25 per share. Ultimately Youngblood received at least $2,750,000 cash and 200,000 shares of Trans-Industries common stock (worth $5.25 per share at the public offering price) for selling Transign. Youngblood also received a salary for one year at $48,000 and leased the land and building upon which Transign was located to Trans-Industries for $36,000 per year for a seven-year period (A. 113-115; Ptf. Ex. 8, pp. 23-24).

Ashton received 450,000 shares of Trans-Industries common stock (worth $5.25 per share at the public offering price). Youngblood received in excess of $3 million.

The Dessers received nothing.

By decision dated June 29, 1976, the Court held that plaintiffs had demonstrated that Ashton breached his agreement with the Dessers in July, 1966 when he made his initial approach

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* Indeed, Youngblood furnished a direct inducement to Ashton's breach when he retained Ashton to find a purchaser, other than the Dessers, for Transign.

to Youngblood and that his acquisition of Transign a year later, which consummated the breach, was the fruition of a continuing course of conduct all directed to "that final object" (A. 142). Plaintiffs were awarded damages of $100,000 against Ashton.

The Court dismissed* the fourth cause of action on the theory, as to Youngblood, that on July 27, 1966 when Youngblood invited Ashton to consider an acquisition without Desser participation, Youngblood had no knowledge of the June 20, 1966 Agreement (A. 146).

Plaintiffs' appeal from the foregoing disposition insofar as the Court dismissed their first and fourth causes of action.

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* As discussed below, the securities fraud claim was dismissed midway in the plaintiffs' case, from which ruling plaintiffs appeal.

LEGAL ARGUMENT

I

PLAINTIFFS PROVED SECURITIES' FRAUD; THE DISMISSAL OF PLAINTIFFS' CLAIM UNDER SECTION 10(b) AND RULE 10b-5 MID-TRIAL WAS ERROR.

Midway through the presentation of plaintiffs' case the Court solicited and then granted defendants' motion to dismiss plaintiffs' first cause of action (T. 507).* The ground for the dismissal was the Court's finding that:

> "[T]he plaintiffs had failed to prove their contention that they and Ashton had entered into such a contract for the purchase of securities . . . " (A. 135-6).

It is submitted that this ruling was in error, and that plaintiffs had presented a prima facie case under § 10(b)** and

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* The Court granted plaintiffs an opportunity to make an offer of proof in this respect, which offer may be gound at T. 497 et seq. The Court retained jurisdiction thereafter, holding that the case was not one in which plaintiffs had evidenced such bad faith in bringing the federal claims that dismissal of the pendant claims was warranted mid-trial (A. 137).

** That Section provides in pertinent part:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails . . ."
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange, or any security not so registered, any manipulative or deceptive device or contrivance in controvention of such rules and regulation as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors . . . "

Rule 10b-5 (17 C.F.R. § 240-10b-5)*and specifically had proven an agreement for the purchase of securities.

The Court below based its dismissal solely upon the finding that no agreement was reached by the parties. That finding in turn was based solely upon the facts that the parties contemplated a written document to embody the final agreement and that the British-American board was required to approve the transaction (A. 135-7).**

That ruling was in error, as a matter both of fact and law. The evidence of an agreement was as follows:

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* That Rule provides in pertinent part:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails . . .
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . .
>
> * * *
>
> In connection with the purchase or sale of any security."

** The Court had previously found chat an oral agreement would suffice under § 10(b) (A. 90-3) and that , in accordance with prevailing authority in this Circuit, the agreement to purchase or sell securities, made with no intention of honoring that agreement, constitutes actionable fraud under § 10(b) (id.). A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2nd Cir. 1967); Schlick v. Penn Dixie Cement Corporation, 507 F.2d 374 (2nd Cir. 1974), cert. denied, 421 U.S. 976; Commerce Reporting Company v. Puretec, Inc., 290 F.Supp. 715 (S.D.N.Y. 1968).

(1) Ashton conceded that an agreement had been reached (T. 535-7, 567).* (2) Plaintiffs all also testified that an agreement encompassing all significant terms, was achieved on June 20, 1966 (e.g., T. 164, 244-7). (3) Finally, Ashton represented that board approval by British-American would be simply a matter of course (T. 254). The only mechanics which the parties contemplated were all of a nature to be performed prior to closing but subsequent to their agreement, and consisted, for example, of formation of the corporation which would purchase Transign, a possible public offering of its shares, and performance of due diligence inquiries (e.g., T. 312, 395).**

As a matter of law, the Court's ruling was also in error. Ashton v. Thornley Realty Co., 346 F. Supp. 1294 (S.D.N.Y. 1972), aff'd in open court, 471 F.2d 647 (2nd Cir. 1973), the authority relied upon by the Court, is plainly distinguishable. There the parties' contract by its terms provided that the agreement would be a nullity if board approval thereof was denied.

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* Specifically, at deposition Ashton testified as follows:

> "Q. Had any agreement in principal been reached whereby British-American was to retain 65 percent and the Dessers 35 percent?
>
> A. Yes." (T. 536)

** It appears that the Court below erroneously attached significance to these contemplated post-agreement activities (see, T. 395).

No comparable condition existed at bar.

Further, the cases hold that the mere fact that a written contract embodying the terms of the parties' agreement is contemplated is not dispositive of the existence of an agreement. Rather, the issue is whether the parties intend to be bound by their oral understanding. F.C. V'Soske v. Barwick, 404 F.2d 495 (2nd Cir. 1968), cert. denied, 394 U.S. 92 (1969); Osguthrope v. Anschutz Land & Livestock Company, Inc., 456 F.2d 996 (10th Cir. 1972); Aboussie v. Aboussie, 441 F.2d 150 (5th Cir. 1971); Warrior Constructors, Inc. v. International Union of Operating Engineers, 383 F.2d 700 (5th Cir. 1967); Lizza & Sons, Inc. v. D'Onfro, 186 F. Supp. 428 (D. Mass. 1959), aff'd, 282 F.2d 175 (1st Cir. 1960), applying New York law.

At bar, the parties plainly intended the agreement between them to be binding, as is evidenced by the fact that only post-contract mechanics remained to be performed.

All other elements of a § 10(b) claim -- a misrepresentation, scienter, materiality, reliance and damage* -- were proven at bar.

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* See, e.g., SEC v. Texas Gulf Sulfur Co., 401 F.2d 833 (2nd Cir. 1968), cert. denied, 390 U.S. 951 (1968); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

Misrepresentation

It is clear that actionable misrepresentation occurs where a party enters a contract with no intention, or a limited intention, of performing. Walling v. Beverly Enterprises, 476 F.2d 393 (9th Cir. 1973); Allico National Corp. v. Amalgamated Meat Cutters & Butchers Workmen of North America, 397 F.2d 727 (7th Cir. 1968); A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2nd Cir. 1967); Commerce Reporting Company v. Puretec, Inc., 290 F. Supp. 715 (S.D.N.Y. 1968); Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967).*

In Walling v. Beverly Enterprises, 476 F.2d 393 (9th Cir. 1973), for example, the Court reversed the District Court's dismissal for lack of subject matter jurisdiction. Plaintiffs alleged a Rule 10b-5 violation, claiming that defendant entered into a contract with them to purchase their shares without intending to perform the contract unless the terms were favorable to defendant.

The Circuit Court stated the question on appeal to be as follows, 476 F.2d 393, 396-397:

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* Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), also recognized that misrepresentations in connection with contracts for purchase or sale are actionable.

> "We must decide whether entering into a contract to sell securities with only a limited intention of performing is a fraud cognizable under Sec. 10(b) and Rule 10(b)5 . . . "

and held that:

> "Entering into a contract of sale with secret reservation not to fully perform it is fraud cognizable under § 10(b) . . . "

At bar, such misrepresentation occurred. Plaintiffs proved that in entering into the agreement with plaintiffs by which they would share a 35/65 stock ownership interest with British-American in the creation of the corporation which would purchase Transign, Ashton misrepresented his authortiy to bind British-American and his and British-American's intention to effectuate such plan. In fact, Ashton never intended to permit the Dessers to participate as principals in the acquisition. During the July, 1966 meeting at Transign, he fomented an argument with the Dessers in Youngblood's presence concerning items previously agreed upon, including the 65-35 ownership and Leonard Desser's position with the new company.

Following that meeting, moreover, Ashton purported to leave the Transign premises early in the day, leaving the Dessers behind; yet some seven or eight hours later, at a time when Ashton could safely assume the Dessers had departed and when to all appearances the acquisition was to proceed -- Ashton made an overture to Youngblood by which the Dessers were to be excluded

from the transaction. Thereafter, when Ashton was "fired" by British-American, and in fact virtually simultaneously with the termination, Ashton became employed by Youngblood (although paid by Transign) and made a series of attempts to finance the acquisition of Transign, again as a principal. Ultimately that goal was accomplished. From the foregoing it is clear that Ashton had no intent to allow the Dessers to participate in the acquisition as agreed.

Scienter

In Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976), the Supreme Court held that a private cause of action under § 10(b) and Rule 10b-5 requires a showing of scienter -- defined by the Court as "a mental state embracing intent to deceive, manipulate or defraud". There can be no question, given the facts described above, that Ashton possessed the requisite mental state on June 20, 1966.

Materiality And Reliance

In Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153-4 (1972), the Supreme Court stated the test of materiality as follows:

> "All that is necessary is that the facts withheld be material in the sense that the reasonable investor might have considered them important in the making of this decision." (emphasis added)

The test of reliance is "whether the misrepresentation is a substantial factor in determining the course of conduct which results in [the recipient's] loss" List v. Fashion Park, 340 F.2d 457, 462 (2nd Cir. 1965), cert. denied, 382 U.S. 811 (1965).

It cannot be doubted that the Dessers would have considered it important that Ashton intended not to allow them to participate as principals in the Transign acquisition. Further, reliance is proven by the fact that the Dessers would not even disclose the identity of the company to Ashton until he agreed that the Dessers would be considered as principals in any acquisition. It was as a result of that disclosure that the Dessers ultimately suffered the loss.

Damages

Damage to the Dessers is self-evident. Instead of participating 35% in ownership of Trans-Industries, which acquired Transign, they received nothing. These Trans-Industries shares would have cost plaintiffs $43,750 and were worth $1,837,500 based upon the public offering price of $5.00 per share.

It is respectfully submitted that given the proof adduced at trial it was plain error for the Court to dismiss plaintiffs' first cause of action mid-stream. That dismissal should be reversed, judgment entered against Ashton on the first claim

and the matter remanded, if necessary, for the taking of evidence with respect to damages.

II

THE COURT BELOW CLEARLY ERRED IN FINDING THAT YOUNGBLOOD DID NOT KNOW OF THE JUNE 20, 1966 AGREEMENT AND MISCONSTRUED THE LAW IN DISMISSING THE FOURTH CLAIM.

The Court below dismissed plaintiffs' fourth claim which alleged that Youngblood tortiously induced Ashton's breach of the June 20, 1966 Agreement not to acquire Transign without Desser participation.

Thus, a prime mover, and beneficiary to the tune of $3.15 million, of the transaction was held without liability. Under New York law the elements which must be proved in an action involving interference with a contract are (1) the existence of a valid contract, (2) defendant's knowledge of that contract, (3) defendant's intentional interference with the contract and (4) damages. Israel v. Wood Dolson Company, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

A. Existence Of A Valid Contract

The Court below unequivocally held that a valid contract existed between the Dessers and Ashton (A. 145) and that Ashton had breached that contract (A. 145).

B. Youngblood's Knowledge Of The Contract

The Court below found that on July 27, 1966, when Youngblood "invited" Ashton to acquire Transign without the

Dessers (A. 146), Youngblood had no knowledge of the June 20, 1966 Agreement (A. 146). For reasons never made clear, the Court held that Youngblood's knowledge and activities at later dates was irrelevant (see below).

The Court's finding that Youngblood lacked knowledge on July 27th was clearly erroneous.* The following evidence was adduced concerning Youngblood's knowledge:

1. Melvin Desser testified that he told Youngblood of the June 20 Agreement and advised him of its terms on at least three separate occasions: once on July 27, 1966 and twice in August, 1966 (T. 420-424, 559-60).**

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* Federal Rules Civil Procedure, Rule 52(a). To quote the Supreme Court:

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'" McAllister v. United States, 348 U.S. 19, 20 (1954), modification denied, 348 U.S. 957 (1955).

** On the latter occasions, Melvin Desser telephoned Youngblood. When Youngblood told him that he was going to make a deal for Transign with British-American but without the Dessers, Melvin Desser reminded him of the June 20 Agreement and the obligations of Ashton and British-American thereunder.

2. At deposition Ashton testified that he advised Youngblood of the June 20 Agreement on July 27, 1966. At trial, Ashton's recollection was conveniently clouded with respect to statements to his co-defendant (T. 560).

Against this strong evidence was only the non-recollection on point of Youngblood himself. For example, Youngblood admitted questioning Ashton in August as to the necessity for paying the Dessers a finder's fee in connection with the ultimately aborted British-American acquisition (Ptf. Ex. 11); Youngblood, however, could not recall Ashton's response. It stands to reason, however, that Ashton told Youngblood that before British-American was free to enter into an acquisition agreement with Transign, it had to reach an understanding with the Dessers because of the obligations under the June 20 Agreement. From Youngblood's point of view there was no other reason for British-American to pay the Dessers one cent let alone $100,000.

The Court's determination that July 27, 1966 was the only date relevant to the cause of action was also clearly erroneous. Elsewhere in its decision the Court held that:

> ". . . Ashton commenced the course of conduct leading to breach of the agreement with plaintiffs within weeks of entering the agreement. That course of conduct was completed little more than a year later when Ashton consummated just the sort of deal the agreement had been intended to prevent." (A. 144)

Clearly, by the quoted language, the Court held the breach to have occurred when Ashton, through Trans-Industries, purchased Transign in 1967 without offering the Dessers the opportunity to purchase. In that light, all of Youngblood's activity prior to the acquisition is relevant.

The Court found that Youngblood knew of the June 20 Agreement by August 1966 (A. 146). Under these circumstances, and given the facts (discussed below) demonstrating intentional interference with the contract, Youngblood should have been held liable.

C. Intentional Interference

The history of Youngblood's numerous attempts to dispose of Transign over a two-year period shows that Youngblood induced Ashton to breach the June 20 Agreement for the simplest of motives -- money. Prior to July 27, 1966, when Youngblood was dealing with the Dessers, he had agreed to sell Transign for $2 million in cash. That evening, knowing of the June 20 Agreement, Youngblood invited Ashton to his home and told him he was prepared to sell Transign to British-American without the participation of the Dessers. They discussed terms. Two weeks later, on August 15, 1966, Ashton described the deal to Lee as involving $2 million cash plus an additional $360,000 payable to Youngblood over ten years. By the time Youngblood told the Dessers he was going to sell to British-American the

price was $2.9 million. Ultimately, when Transign was sold to Trans-Industries, Youngblood expected to receive more than $3.4 million plus certain other economic benefits. Ashton too, as a principal, stood to gain considerably more through this acquisition than would have been the case with Desser participation.

With every subsequent attempt to sell Transign, Youngblood failed to notify the Dessers of the potential sales, nor did he advise Ashton to deal with them. In fact, when Melvin Desser telephoned Youngblood in 1967 to inquire about the availability of Transign, Youngblood said it was not for sale, despite the fact that he and Ashton negotiated with at least three corporations to sell Transign during the first six months of 1967.

Youngblood's inducement of the breach is highlighted by the fact that in August or September, 1966 Youngblood retained Ashton to find a buyer, other than the Dessers, for Transign. At the time, the Court found (A. 146) that Youngblood had knowledge of the June 20 Agreement. In essence, by this retention Youngblood financially rewarded Ashton for breaching the Agreement, which provided, inter alia:

"The undersigned [Ashton] will not attempt to acquire the Company or deal with the Company in any manner either personally or in any of his corporate capacities, except on the terms and conditions acceptable to you [plaintiffs] . . . " (A. 102)

Moreover, Youngblood in October or November, 1966 lent Ashton, without collateral, the sum of $140,000 with which to purchase 70,000 shares of Keene Corporation. The purchase was a step toward the contemplated acquisition of Transign, by Keene, of which Youngblood was aware (supra, p. 24). Had the acquisition been consummated, the Dessers would not have been participants,as Ashton never advised them of the negotiations. By this activity, Youngblood again financially underwrote Ashton's activities in breach of the June 20, 1966 Agreement.

Finally, Youngblood furnished inducement to Ashton's breach when he agreed to sell Transign to Trans-Industries, the corporation of which Ashton was principal, without asking the Dessers to participate and without insisting that Ashton do so. The incentive to ignore the June 20 Agreement was again money. From the outset the organizers of Trans-Industries envisioned it as a vehicle for making a public offering. By not including the Dessers, Youngblood increased his proportionate share of ownership in Trans-Industries with a view towards the ultimate public offering, as did Ashton. Indeed a year after the Transign

acquisition, Trans-Industries filed a Registration Statement on Form S-1 with the Securities and Exchange Commission and in January 24, 1969 sold 500,000 shares to the public at $5.25 per share. On that date Youngblood owned 200,000 shares of Trans-Industries for which he paid $25,000 and Ashton owned 405,000 shares.

The Court's determination with respect to interference was grounded upon the erroneous concept that Youngblood, not being a party to the June 20, 1966 Agreement, was free to explore with Ashton other opportunities for the sale of Transign because "in furtherance of his own economic and personal interests" (A. 148). Apparently the Court found that Youngblood's conduct was privileged, although there is no clear statement on point. The law is contrary.

Although the cases held that pursuit of certain legal interests will justify an interference (i.e., negative intent), private economic interests have been held insufficient. In State Enterprises, Inc. v. Southridge Cooperative Section, Inc., 18 A.D.2d 226, 238 N.Y.S.2d 724 (1st Dept. 1964), for example, the Court held that if defendant, with knowledge of plaintiff's contract, made an offer of better terms to the breaching party, that conduct would state a claim for tortious inducement. The

Court specifically rejected the defendant's economic interests as a justification.*

In Hannigan v. Sears, Roebuck & Co., 410 F. 285, 291 (7th Cir. 1969), cert. denied, 396 U.S. 902, the Court indicated that "purely private business reasons" will never negative intent. Accord, Gold Medal Farms, Inc. v. Rutland County Co-Operative Creamery, Inc., 9 A.D.2d 473, 195 N.Y.S.2d 179 (3rd Dept. 1960); Noah v. L. Daitch & Co., 22 Misc.2d 380, 192 N.Y.S.2d 380 (Sup. Ct. N.Y. Co. 1959).

Moreover, Hannigan makes it clear that where plaintiff is itself prevented from performing the contract by the defendant, the claim will lie. Accord, Prosser, The Law of Torts (4th Ed.) § 129, p. 936 (1971); cf., Fradus Contracting Co., Inc. v. Taylor, 201 App. Div. 298, 194 N.Y.S. 286 (1st Dept. 1922). At bar, of course, the Dessers were prevented from participating in the acquisition by Youngblood's activities.

Finally, Keviczky v. Lorber, 290 N.Y. 297, 49 N.E.2d 146 (1943), is dispositive. There, Burruker employed plaintiff as broker to sell Burruker's real property. Plaintiff engaged in various negotiations culminating in an agreement by defen-

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* See also, Prosser, The Law of Torts (4th Ed.) § 129, p. 934 (1971), indicating inducement will be found where defendant holds "forth an incentive such as the offer of a better price or better terms."

dant Lorber to purchase at a fixed price. Lorber thereafter demanded that plaintiff kick back most of his brokerage commission, which plaintiff refused. Lorber thereafter advised plaintiff that he had decided not to purchase the property. Plaintiff advised Burruker of these events and notified Burruker that "if Mr. Lorber attempted to obtain the property without plaintiff, the latter expected Mr. Burruker to protect him in the matter". Some time thereafter, Lorber consummated the purchase, using another broker.

The Court held that Lorber had unjustifiably interfered with plaintiff's right to participate as broker in the transaction, holding that a party's act in procuring others not to deal with plaintiff is actionable as an intentional interference.

At bar, in like fashion, Youngblood on July 27 procurred Ashton's agreement not to deal with the Dessers, in spite of the June 20 Agreement. That conduct continued for over a year and culminated in an acquisition without the Dessers.

The ruling below, based upon an erroneous concept of law, must be reversed.

D. Damage

There can be little doubt that the plaintiffs suffered damage by reason of Youngblood's tortious conduct. They

were entitled to participate as principals in the acquisition of Transign. In fact, they were offered no opportunity whatever.

The Court's dismissal of the fourth cause of action, founded upon a plainly mistaken finding of fact and improper construction of the law, should be reversed and the matter remanded for trial on the issue of damages.

CONCLUSION

The judgment below should be modified by reversing the dismissal of plaintiffs' first cause of action as against Ashton and fourth cause of action as against Youngblood and the matter should be remanded for trial on the issue of damages arising under these claims; in all other respects, the judgment should be affirmed.

Respectfully submitted,

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